Supreme Court, U.S.
FILED

No. 94171 4 APR 18 1995

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In The

Supreme Court of the United States

October Term, 1994

JOE HABIE,

Petitioner,

vs.

BARRY E. KRISCHER, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Fourth District Court of Appeal for the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida has enacted a statutory scheme which, simultaneously: purports to criminalize absolutely the violation of child custody orders; authorizes such violation where a parent or guardian "reasonably believes" it necessary to protect the minor from child abuse; and holds parents criminally responsible if a child is abused as a consequence of their negligence. The question presented is whether this scheme is constitutional under the Due Process Clause of the Fourteenth Amendment or whether it conflicts with those decisions of this Court which have struck down penal provisions that failed to provide the citizenry clear guidance as to the conduct sought to be prohibited by law.

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No.

In The

Supreme Court of the United States

October Term, 1994

JOE HABIE,

Petitioner,

vs.

BARRY E. KRISCHER, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Fourth District Court of Appeal for the State of Florida

PETITION FOR A WRIT OF CERTIORARI

Joe Habie respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal for the State of Florida.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeal (App., *infra*, 5a-14a) is reported at 642 So. 2d 138 (Fla. 4th D.C.A. 1994). The opinion of the Circuit Court (App., *infra*, 15a-20a) is unreported.

STATEMENT OF JURISDICTION

The District Court entered its judgment on September 14, 1994. The Supreme Court of Florida denied discretionary review on January 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall . . . deprive any persons of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

This petition raises fundamental questions concerning the power of the state to criminalize violations of court orders pertaining to visitation and child custody. Over the last few years, statutory schemes enforcing such decrees through criminal sanction have proliferated, engrafting on what was once considered a matter for family court, penalties once limited to traditional criminal conduct. As will be more fully discussed below, the extension of criminal sanction to the internecine conduct of custody battles has led to the enactment of statutes lacking constitutionally sufficient standards of conduct and *mens rea*. In Florida, this has resulted in a statutory scheme that permits parents to violate a court order if the parent reasonably believes that it is necessary to protect a child from abuse, but provides parents with no clear standard as to whether that determination is to be made under a subjective or an objective test or notice of those circumstances where parents are required to take action to protect the child from abuse. Florida's statutory scheme conflicts in principle with numerous decisions of this Court and constitutes

a severe diminution of due process protections traditionally available where conduct is subjected to criminal penalty.

A. Faced With Evidence Of Child Abuse, Joe Habie Removed His Children From Florida In Violation Of A Prior Court Custody Decree.

Joe Habie, is a citizen and resident of Guatemala. His former wife, Amy Habie is a resident of the United States. Following a Final Judgment of Dissolution of Marriage, the Circuit Court for Palm Beach County, Florida, awarded primary residential custody of their two children to Mrs. Habie. Mr. Habie received shared parental responsibility of the minor children, but visitation rights were restricted to the United States.

On April 13, 1992, while his former wife was on vacation, Mr. Habie visited his children in Boca Raton, Florida. During his visit, he discovered evidence of child abuse. Faced with evidence of physical abuse and fearing for the safety of his children, Joe Habie removed his children from his former wife's residence, where they were being cared for by a housekeeper, and flew them to Guatemala to live with him.

B. Florida Statute § 787.04 Authorizes Parents To Disobey Custody Decrees Where Necessary To Prevent Child Abuse As Required By Florida Statute § 827.04.

Florida Statute § 787.04(1) (1993) makes it unlawful for any person to remove a minor beyond the limits of the state in violation of a court order.[1] Paragraph (5) of Section 787.04,

1. Section 787.04 states:

> (1) It is unlawful for any person, in violation of a court order, to lead, take, entice, or remove a minor beyond the limits of this state, or to conceal the location of a minor, with personal knowledge of the order.

however, provides an exception to the express prohibition of Paragraph (1) where the parent or guardian has removed the minor from the state in circumstances where the person:

> [R]easonably believes that his action was necessary to protect the minor from child abuse as provided in s. 827.04.

The statute does not state whether the person's belief is to be measured by a subjective or an objective standard. The statute, however, does incorporate by express reference the child abuse statute, Section 827.04, to define the circumstances under which a parent may lawfully disregard the proscription of Paragraph (1).

Child abuse is a felony under Florida law. Florida Statute § 827.04 (1993).[2] And under Section 827.04 parents and guardians are under an affirmative obligation to insure that children are not subjected to abuse by others. Significantly, even the negligent failure to act will subject a parent or guardian to criminal liability.

---

2. Section 827.04 states:

> (1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree. . . .

C. Course of Proceedings

On August 4, 1992, an arrest warrant was issued for Joe Habie charging Mr. Habie with a violation of Florida Statute § 787.04.

On March 17, 1993, Mr. Habie filed an Amended Complaint for Declaratory Relief attacking the constitutionality of Section 787.04.

Following a hearing, the Circuit Court issued an Order upholding the constitutionality of Section 787.04. (App., *infra* 15a).

The decision of the Circuit Court was affirmed by the Fourth District Court of Appeal. The Court expressly upheld the constitutionality of Section 787.04 (App., *infra*, 5a). The District Court held that "the standard requiring people to reasonably believe that their actions are necessary to protect a minor from child abuse (particularly when child abuse is defined), is a 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.' " (App., *infra*, 13a). The Supreme Court of Florida denied a petition for discretionary review (App., *infra*, 1a).[3]

---

3. In the District Court, the State of Florida, sought to invoke the fugitive disentitlement doctrine to have Petitioner's appeal dismissed. Citing, *McGee v. Martinez*, 555 So. 2d 914 (Fla. 1st D.C.A. 1990) Petitioner responded that Florida law permits litigants not physically within the state to challenge state law through a declaratory judgment action. Whether because of that precedent or the failure of the state to have raised this issue before the trial court, the Fourth District chose not to consider the state's objection.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS IN PRINCIPLE WITH NUMEROUS DECISIONS OF THIS COURT THAT HAVE STRUCK DOWN PENAL STATUTES WHICH ARE SO VAGUE AS TO FAIL TO PROVIDE ADEQUATE WARNING OF THE CONDUCT PROSCRIBED.

The standards of conduct required by the reasonableness provision of Section 787.04(5) and the negligence provision of Section 827.04 subject parents and guardians to wholly inconsistent obligations of law. Section 827.04 does not state what actions a parent is required to take to protect a child. While the statute imposes an affirmative obligation upon parents to insure that a child is not deprived of necessary food, clothing, shelter, or medical treatment, the statute does not say what a parent must do to fulfil this duty. Similarly, while the statute imposes an affirmative obligation upon parents to prevent the infliction of physical or mental injury upon a child, the statute does not say what actions a parent must take to prevent such injury.

Ironically, it is in Section 787.04(5) that the legislature recognized a specific act that could be taken to prevent child abuse, to wit, removing a child from the state in violation of a court order. Thus, while the legislature sought to strengthen a court's authority to enforce its orders, the legislature recognized that extreme measures may be necessary to protect children.

Indeed, implicit within the conscious incorporation of Section 827.04 within Paragraph (5) of Section 787.04 is the recognition that under some circumstances a parent may be under a legal duty to violate a court order to prevent child abuse.

In its argument before the trial court, the state contended that parents are not permitted to violate a court order to fulfil the obligations imposed by the child abuse statute. In response to the Court's inquiry, the state conceded that Section 827.04 does not state what actions a parent is obligated to take to protect a child. While one can certainly conceive of circumstances where a mere telephone call to the authorities may be all that is required, the fact remains that the legislature specifically contemplated that under some circumstances removing a child from the state may be necessary.

But what the legislature failed to provide were clear guidelines to parents faced with the conflicting duties imposed by law. Section 787.04 purports to prohibit removing a child from the state in violation of a court order. Section 827.04 purports to prohibit child abuse. But a reading of Section 787.04 reveals that it permits violation of a court order under some circumstances and a reading of Section 827.04 reveals that it not only reaches affirmative child abuse, but the negligent failure to act in the face of child abuse. Such a statutory scheme, one that makes it a crime to engage in certain conduct while at the same time making it a crime not to engage in the very same conduct, places an impossible and unconstitutional burden upon persons who seek to conform their conduct to the requirements of the law.

A. Constitutional Requirements of Due Process

A statute is void for vagueness under the Due Process Clause if it fails to give a person of ordinary intelligence fair notice that his or her conduct is forbidden by statute. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). A criminal statute is similarly void for vagueness if it encourages arbitrary and discriminatory enforcement. *Colautti, supra*; *Papachristou*, 405 U.S. 162; *Lanzetta v. New Jersey*, 306

U.S. 451, 453 (1939). The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

These principles are embodied within the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Vagueness challenges rest on the theory that persons are entitled to plan their behavior based on laws which afford a reasonable opportunity to know what is and what is not permitted. The degree of vagueness that is constitutionally permissible, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the statute in question. Economic regulations are subject to a less strict vagueness test and courts have permitted greater tolerance of enactments with civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe."

Hoffman Estates v. Flipside, 455 U.S. 489, 498-99 (1982). Where a statute imposes criminal penalties, the standard of certainty required is higher. *Papachristou*, 405 U.S. 162; *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983).

Even where a statute gives fair notice of the conduct prohibited, it may still be void for vagueness where it lends itself to arbitrary enforcement. *Kolender v. Lawson*, *supra*. Indeed, the courts have recognized that the more central concern of vagueness jurisprudence "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Where the legislature fails to provide such guidance, a statutory scheme may permit, "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 575.

B. The Principles Applied

In *United States v. Cohen Grocery*, 255 U.S. 81 (1924) this Court struck down a provision of the Lever Act which prohibited the willful making of an "unjust or unreasonable rate of charge" in handling or dealing in or with any necessaries. This Court deemed this language so ambiguous that it found it unnecessary to elaborate beyond citing to the holding of the court below that to "attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." In other words, where the lawfulness of conduct depends upon standards to be determined after the fact by a court or jury, a statute making such conduct a crime is unconstitutionally vague.

The importance of clear standards of conduct was also

demonstrated by the decisions of this Court in *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) and *Nash v. United States*, 229 U.S. 373 (1913). In *Nash*, this Court upheld the Sherman Anti-Trust Act, against an argument that the statute was unconstitutionally vague. In *Cline*, by contrast, the Court struck down the Colorado Anti-Trust Act as unconstitutionally vague. Although both statutes purported to regulate business practices thought to constitute an undue restraint on trade, the Sherman Anti-Trust Act targeted businesses engaged in interstate commerce. In that venue, the Court held that the "common-law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate commerce what he could and could not do under the statute." 274 U.S. 460. In contrast to the Sherman Anti-Trust Act, the Colorado Anti-Trust Act, sought to prohibit local businessmen from charging anything but a "reasonable price" or a "reasonable profit," concepts which could not be measured by any fixed standards. 274 U.S. 465.

In the instant case, the Fourth District upheld a statutory scheme that is wholly inconsistent with the principles of notice which this Court has held absolutely necessary under the Due Process Clause of the Fourteenth Amendment. There exist no standards upon which a parent can look to determine how to fulfil the conflicting requirements of the law.

II.

THE QUESTION PRESENTED IS IMPORTANT.

State legislatures are increasingly imposing criminal penalties upon conduct which in the past had been left to family court. To whatever extent such criminal sanctions are necessary, it must be remembered that the conduct now being made criminal was often not even considered a crime just a few short years ago.

And because the conduct in question is not of the traditional *malum in se* kind, the standards of conduct proscribed must be clearly and carefully spelled out or the legislation will become nothing more than a trap for the innocent.

The importance of clear standards for legislation impinging upon the family was underscored in the decision of this Court in *Colautti v. Franklin*, 439 U.S. 379 (1979). In *Colautti*, this Court reviewed Section 5(a) of the Pennsylvania Abortion Statute. That Section required every physician who performed an abortion to make a determination, "based on his experience, judgment or professional competence" that the fetus was not viable. If the physician determined that the fetus was viable or "if there [was] reason to believe that the fetus may be viable," then the physician was required to adhere to the prescribed standard of care, that is to take whatever measures were necessary to save the fetus.

This Court held that this provision was ambiguous for a number of reasons. This Court first noted that it was unclear whether the statute imposed a purely subjective standard, or whether it imposed a standard that had elements of the subjective and objective. 439 U.S. 391. Second, the statute required the physician try to save the fetus if the fetus was viable or "if there [was] sufficient reason to believe that the fetus may be viable." The Court found that this provision was ambiguous because it was unclear "whether there must be 'sufficient reason' from the perspective of the judgment, skill, and training of the attending physician, or 'sufficient reason' from the perspective of a cross-section of the medical community or panel of experts." 439 U.S. 391. The difference was deemed critical. A rural physician faced with performing an abortion would do so at his peril if the question of viability was measured by the skill and technology available at a teaching hospital or medical center. 439 U.S. 391-392. Finally, the statute was deemed constitutionally infirm

because it subjected the physician to conflicting legal and medical duties. As drafted it was not clear whether the physician's first obligation was to the mother or to the fetus.

Section 787.04 suffers from the same infirmities. It is simply not clear how a parent is to reconcile the conflicting requirements of Section 787.04 and Section 827.04.

The court below held that the standard of "reasonable belief" found in Section 787.04 was not unconstitutionally vague in that this standard is found in a number of criminal statutes providing affirmative defenses. *See* Florida Statute 776.012 (providing that a person is justified in the use of force when he "reasonably believes" such conduct is necessary to defend himself or prevent death or great bodily injury) and Section 776.05 (permitting a law enforcement officer to use force when he "reasonably believes" it necessary to defend himself).

But the standards of conduct applicable to traditional criminal offenses cannot so easily be translated to the realm of the family, particularly where the statutes impose such conflicting obligations of law. As this Court has recognized many times:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278, 287 (1961), quoting, *Lanzetta*, 306 U.S. 453. But that is precisely what Section 787.04 does; force persons to act at their peril.

The statutory scheme herein constitutes a trap for parents and guardians. It obligates persons to act in the best interests of

children yet it threatens prosecution and imprisonment if it is later determined that the actions taken were not reasonable. Such a scheme of law cannot be reconciled with the most basic principles of notice which this Court has repeatedly found to be the essential requirement of Fourteenth Amendment due process. Because state legislatures are relying more and more upon penal provisions to address problems that family courts with civil remedies have failed to solve, it is critical that this Court insure that the principles of fair notice which have long provided protection against unconstitutional deprivation of liberty not be ignored.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE SUPREME COURT OF FLORIDA DATED JANUARY 18, 1995

SUPREME COURT OF FLORIDA

CASE NO. 84,594

WEDNESDAY, JANUARY 18, 1995

JOE HABIE,

Petitioner,

v.

BARRY E. KRISCHER, etc., et. al.,

Respondents.

District Court of Appeal,
4th District - No. 93-2480

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. See Fla. R. App. P. 9.330(d).

SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur

Appendix A

BHP
cc: Hon. Marilyn Beuttenmuller, Clerk
Hon. Dorothy H. Wilken, Clerk
Hon. Richard B. Burk, Judge

Jon May, Atty.
Alvin E. Entin, Atty.
John W. Tiedemann, Atty.

A True Copy

TEST: [seal]

Sid J. White,
Clerk, Supreme Court

APPENDIX B — MANDATE FROM DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED SEPTEMBER 30, 1994

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable John W. Dell, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE:	SEPTEMBER 30, 1994
CASE NO.:	93-2480.
COUNTY OF ORIGIN:	PALM BEACH
T.C. CASE NO.:	CL 92-12845 AO
STYLE:	HABIE V. KRISCHER

Appendix B

A TRUE COPY

s/ Marilyn Beuttenmmuller
Marilyn Beuttenmmuller, Clerk
District Court of Appeal
Fourth District

ORIGINIAL TO: HON. DOROTHY H. WILKEN, CLERK

cc: JON MAY
ENTIN, SCHWARTZ, & MARGULES, P.A.
ATTORNEY GENERAL- W. PALM BEACH

APPENDIX C — OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT FILED SEPTEMBER 14, 1994

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1994

CASE NO. 93-2480.

L.T. CASE NO. CL 92-12845 AO.

JOE HABIE,

Appellant,

v.

BARRY E. KRISCHER, as State Attorney for the Fifteenth Judicial Circuit, and BETTY C. RESCH, as one of his Assistant State Attorneys,

Appellees.

Opinion filed September 14, 1994

Appeal from the Circuit Court
for Palm Beach County;
Richard B. Burk, Judge.

Entin, Schwartz & Margules, P.A.,
Miami, and Jon May, Coconut Grove,
for appellant.

Appendix C

Robert A. Butterworth, Attorney General, Tallahassee, Joan Fowler and John Tiedeman, Assistant Attorneys General, West Palm Beach, for appellees.

KLEIN, J.

Joe Habie, a resident of Guatemala, removed his two children from Palm Beach County to Guatemala in violation of a court order. Following the issuance of a warrant for his arrest he filed this declaratory action attacking the constitutionality of section 787.04, Florida Statutes (1993) on the ground that it is too vague. We uphold the validity of the statute.

Section 787.04 provides in part:

> (1) It is unlawful for any person in violation of a court order, to lead, take, entice or remove a minor beyond the limits of this state, or to conceal the location of a minor, with personal knowledge of the order.
>
> * * *
>
> (5) It is a defense under this section that a person who leads, takes, entices or removes a minor beyond the limits of the state reasonably believes that his action was necessary to protect the minor from child abuse as defined in 827.04.

Section 827.04, Florida Statutes (1993) provides in part:

Appendix C

(1) Whoever, willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, inflicts or permits the infliction of physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree . . . .

The facts were set forth by the trial court as follows:

Plaintiff, Joe Habie, is a resident of and domiciled in Guatemala. Following the Final Judgment of Dissolution of Marriage, the court awarded primary residential custody of Plaintiff's two children to Plaintiff's former spouse. Plaintiff received shared parental responsibility of the minor children, but visitation rights were restricted to the United States.

On April 13, 1992, while his former wife was vacationing, Plaintiff visited his children in Boca Raton, Florida. During his visit, he allegedly discovered evidence of child abuse. Out of concern for his children, Plaintiff violated the custody decree and took the children back to Guatemala to reside. On August 4, 1992 Judge Wessel issued a warrant for Plaintiff's arrest. The warrant alleged

> violations of § 787.04(1) for unlawfully removing a minor from the state in violation of a court order. Plaintiff remains in Guatemala and has not been arrested in Florida on Defendant's charge.

Habie argues that section 787.04(5), *supra,* which provides that it is a defense if the person removing the minor from the state in violation of a court order "reasonably believes his action was necessary to protect the minor from child abuse" is unconstitutionally vague. He specifically argues that the term "reasonably believes' fails to provide adequate guidance to a parent as to what action is permitted.

Judge Burk, the trial judge, has provided a scholarly analysis, with which we agree, and we therefore adopt it:

> A vague statute is one that fails to give adequate notice of what conduct is prohibited and which because of its imprecision, may also invite arbitrary and discriminatory enforcement. *S.E. Fisheries v. Dept. of Nat. Resources,* 453 So. 2d 1351, 1353 (Fla. 1984). A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Powell v. State*, 508 So. 2d 1307, 1310 (Fla. 1987). However, "to make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and

specifications of acts or conduct prohibited." *Id.* It is only necessary that the language of the statute convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id.* Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. *S.E. Fisheries, supra,* [at] 1353. Further, as a general rule, the question of "reasonable beliefs" is a factual determination which should be left for the jury. *Lusk v. State,* 531 So. 2d 1377 (Fla. 2d DCA 1988).

[The State Attorney argues] that the [phrase] "reasonably believes" as used in Florida Statute § 787.04(5) is not a new concept in the Florida criminal law. A number of Florida criminal statutes afford the defendant an affirmative defense based on his reasonable belief. Specifically § 776.012 Fla. Stat. provides that a person is justified in the use of force when he "reasonably believes" such conduct is necessary to defend himself or to prevent death or great bodily injury. Likewise, § 776.05 permits a law enforcement officer to use force when he "reasonably believes" it is necessary to defend himself. Further, § 832.05 makes it unlawful to issue checks when the maker knows that he has insufficient funds in deposit to cover the checks. However, the section does not apply when the payee "has

reason to believe" that sufficient funds were not on deposit when the check was issued. The court, in *Dirk v. State,* 305 So. 2d 187 (Fla. 1974), upheld this statute as valid when the phrase "reason to believe" was constitutionally attacked. The *Dirk* court stated that § 832.05 was neither vague nor ambiguous because it conveyed a sufficient warning as to the proscribed conduct when measured by common understanding and practice.

Further, the United States Supreme Court declared in *United States v. Ragen,* 62 S.Ct. 374, 378 (1942) that "the mere fact that a penal [statute] is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." The court in *Donovan v. Kaszychi Sons Contractors, Inc.,* 599 F. Supp. 860, 871 (S.D.N.Y. 1984) specifically held that "reasonable belief" is an objective standard. Further, a statute is not facially void for vagueness simply because there might be a marginal situation where the statutory meaning would be questionable. *United States v. Ortiz,* 738 F. Supp. 1394 (S.D. Fla. 1990). Finally, in upholding a statute using the phrase "reasonably should have known", the *People v. Rodriquez,* 726 P.2d 113, 146 (Ca. 1986) court stated that 'this argument is troubling only if one believes the average

juror is unable to ascertain and apply the meaning of 'reasonably should have known' in instruction reiterating the statutory language. We doubt this is the case ... Moreover, the average juror has the ability to cull from everyday experience a standard by which to assess the ability of a defendant to know the status of his or her victim." *Id.* at 147.

Finally, Plaintiff's arguments to void § 787.04 Fla. Stat. must fail because he does not support any of his contentions with sufficient case law. None of Plaintiff's cases address the issue of the constitutionality of a statute which provides a defendant with an affirmative defense based upon his "reasonable belief" that his action was justified or necessary. In *United States v. Cohen Grocery Co.*, 225 U.S. 81, 41 S.Ct. 298 (1924), the Supreme Court determined the constitutionality of a statute making it unlawful to charge "any unjust or unreasonable rate or charge in handling or dealing with any necessaries." This determination does not address "reasonable beliefs" and is clearly distinguishable from the case at hand....

Thus, a constitutional challenge based on vagueness questions "wnether ordinary people will understand what the statute requires or forbids when measured by

> common understanding and practice." *State v. Bussey,* 463 So. 2d 1141, 1144 (Fla. 1986). The terms "reasonable" and "believes" are words of common usage found in any standard dictionary. Any person of ordinary intelligence understands their meaning. Further, the average juror has the ability to determine the question of "reasonable belief", since the reasonableness standard has been sufficiently utilized in several other Florida criminal statutes and upheld by the United States Supreme Court. Therefore, a statute that affords an affirmative defense to a person criminally charged based on his "reasonable belief" should not be held unconstitutionally vague. This Court therefore denies Plaintiff's Motion for Summary Judgment and grants Defendants' Cross Motion for Summary Judgment upholding the statute as constitutionally valid.

Habie primarily relies on *State ex rel. Lee v. Buchanan,* 191 So. 2d 33, 37 (Fla. 1966), which involved a statute making it a felony to charge more than reasonable charges or fees" for legal services, medical expenses, etc. in connection with adoptions. A lawyer, charged with having received compensation in excess of what was reasonable, attacked the statute as being unconstitutionally vague. Our Supreme Court agreed, stating:

> Throughout the history of the legal profession, attorneys have remained highly individualistic in the area of legal fees. This is

> so, because there are such considerations as the degree of a lawyer's proficiency and success, his professional and ethical standing and reputation, his specialization or experience and training, and the resultant desire by a client for the services of a certain attorney . . . . One jury and judge, applying the statute, could find as unreasonable a given fee, while another jury and judge under identical circumstances could conclude that a larger fee was proper. This could be especially true as to the range of fees found reasonable in the so-called higher and lower income and cost living areas of the state. An attorney, searching earnestly for precedents in an effort to keep to what is safe, could not possibly know but could only speculate as to why one lawyer was adjudged a felon and the conduct of another deemed not violative, when the fee charged by the latter was perhaps considerably in excess of the one charged by the former under a seemingly parallel situation. . . .

We disagree with Habie that the statute in the present case cannot be distinguished from the statute in *Lee*. We think that the standard requiring people to reasonably believe that their actions are necessary to protect a minor from child abuse (particularly when child abuse is defined), is a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice". *Marrs v. State*, 413 So. 2d 774, 775 (Fla. 1st DCA 1981). Clearly, the statute in Lee, making it a felony to charge unreasonable professional fees, without any

guidelines, was not sufficiently definite to warn as to the proscribed conduct.

In *State v. McCoy*, 421 N.W.2d 107 (Wis. 1988), a statute making it a felony to take a child from a parent in violation of a court order provided an exception if the action was "taken to protect a child from imminent physical harm". The Wisconsin Supreme Court upheld the validity of the statute against a vagueness challenge, reading a reasonableness" requirement into the statute. The Florida statute is, of course, more specific than the Wisconsin statute since it has the reasonableness standard built in.

We conclude the statute is not unconstitutionally vague and affirm.

FARMER, J., and MAY, MELANIE G., Associate Judge, concur.

APPENDIX D — ORDER OF THE CIRCUIT COURT OF THE FIFTEENTH CIRCUIT OF FLORIDA, PALM BEACH COUNTY, FLORIDA FILED JUNE 27, 1993

IN THE CIRCUIT COURT OF THE FIFTEENTH CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL-92-12845 AO

JOE HABIE,

Plaintiff(s),

vs.

BARRY E. KRISCHER, etc. et al,

Defendant(s).

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on the Plaintiff's Motion for Summary Judgment and the Defendants' Cross Motion for Summary Judgment. Based on the hearing of these matters, the Court finds as follows:

I. FACTS

Plaintiff, Joe Habie, is a resident of and domiciled in Guatemala. Following the Final Judgment of Dissolution of Marriage, the court awarded primary residential custody of

Plaintiff's two children to Plaintiff's former spouse. Plaintiff received shared parental responsibility of the minor children, but visitation rights were restricted to the United States.

On April 13, 1992, while his former wife was vacationing, Plaintiff visited his children in Boca Raton, Florida. During his visit, he allegedly discovered evidence of child abuse. Out of concern for his children, Plaintiff violated the custody decree and took the children back to Guatemala to reside. On August 4, 1992 Judge Wessel issued a warrant for Plaintiff's arrest. The warrant alleged violations of §787.04(1) for unlawfully removing a minor from the state in violation of a court order. Plaintiff remains in Guatemala and has not been arrested in Florida on Defendant's charge.

Subsequently, Plaintiff filed this declaratory action in order to quash the existing warrant against him. Because no factual dispute exists, the sole issue raised by this case requires a court determination of the constitutionality of §787.04 Fla. Stat. (1991). Plaintiff has filed a motion for summary judgment and Defendant has cross filed a motion for summary judgment.

II. ANALYSIS

This court has the duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to validity of a statute in favor of its constitutionality. *Falco v. State*, 407 So.2d 203, 206 (Fla. 1981). In the instant case, Florida Statute 787.04 declares it unlawful for any person to remove a minor beyond the limits of this State, or to conceal the location of a minor, in violation of a Court Order or during the pendency of an action or proceeding affecting such minor or the custody of such minor. Paragraphs (1)-(4) of the Statute detail the unlawful acts.

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Paragraph (5) provides an affirmative defense to a person charged under the Statute as follows:

> It is a defense under this section that a person who leads, takes, entices, or removes a minor beyond the limits of the state reasonably believes that his action was necessary to protect the minor from child abuse as defined in §827.04.

In deciding the constitutionality of §787.04 Fla. Stat. (1991), this court should focus on the phrase "reasonably believes" in §787.04(5) to determine whether these words provide adequate notice as to the proscribed conduct necessary to establish an affirmative defense for a person charged under this statute. Plaintiff urges this court to find the statute void for vagueness, avering it violates both the Florida and Federal Constitution.

A vague statute is one that fails to give adequate notice of what conduct is prohibited and which because of its imprecision, may also invite arbitrary and discriminatory enforcement. *S.E. Fisheries v. Det. of Nat. Resources,* 453 So.2d 1351, 1353 (Fla. 1984). A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Powell v. State,* 508 So.2d 1307, 1310 (Fla. 1987). However, "to make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of acts or conduct prohibited." *Id.* It is only necessary that the language of the statute convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id.* Where a statute does not specifically define words of common usage, such

words must be given their plain and ordinary meaning. *S.E. Fisheries, supra,* st 1353. Further, as a general rule, the question of "reasonable beliefs" is a factual determination which should be left for the jury. *Lusk v. State,* 531 So.2d 1377 (Fla. 2d DCA 1988).

Defendants argue that the phase "reasonably believes" as used in Florida Statute §787.04(5) is not a new concept in the Florida criminal law. A number of Florida criminal statutes afford the defendant an affirmative defense based on his reasonable belief. Specifically, §776.012 Fla. Stat. provides that a person is justified in the use of force when he "reasonably believes" such conduct is necessary to defend himself or to prevent death or great bodily injury. Likewise, §776.05 permits a law enforcement officer to use force when he "reasonably believes" it is necessary to defend himself. Further, §832.05 makes it unlawful to issue checks when the maker knows that he has insufficient funds on deposit to cover the checks. However, the section does not apply when the payee "has reason to believe" that sufficient funds were not on deposit when the check was issued. The court, in *Dirk v. State,* 305 So.2d 187 (Fla. 1974), upheld this statute as valid when the phrase "reason to believe" was constitutionally attacked. The *Dirk* court stated that §832.05 was neither vague nor ambiguous because it conveyed a sufficient warning as to the proscribed conduct when measured by common understanding and practice.

Further, the United States Supreme Court declared in *United States v. Ragen,* 62 S.Ct. 374, 378 (1942) that "the mere fact that a penal state is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." The court in *Donovan v. Kaszychi & Sons Contractors. Inc.,* 599 F. Supp. 860, 871 (S.D.N.Y. 1984) specifically held that

"reasonable belief" is an objective standard. Further, a statute is not facially void for vagueness simply because there might be a marginal situation where the statutory meaning would be questionable. *United States v. Ortiz*, 738 F. Supp. 1394 (S.D. Fla. 1990). Finally, in upholding a statute using the phase "reasonably should have known", the *People v. Rodriquez*, 726 P.2d 113, 146 (Ca. 1986) court stated that "this argument is troubling only if one believes the average juror is unable to ascertain and apply the meaning of 'reasonably should have known' in instruction reiterating the statutory language. We doubt this is the case . . . . Moveover, the average juror has the ability to cull from everyday experience a standard by which to assess the ability of a defendant to know the status of his or her victim." *Id.* at 147.

Finally, Plaintiff's arguments to void §787.04 Fla. Stat. must fail because he does not support any of his contentions with sufficient case law. None of Plaintiff's cases address the issue of the constitutionality of a statute which provides a defendant with an affirmative defense based upon his "reasonable belief" that his action was justified or necessary. In *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298 (1924), the Supreme Court determined the constitutionality of a statute making it unlawful to charge "any unjust or unreasonable rate or charge in handling or dealing with any necessaries." This determination does not address "reasonable beliefs" and is clearly distinguishable from the case at hand. Further, in *Colautti v. Franklin*, 439 U. S . 379, 99 S . Ct. 675 (1979), the Supreme Court held the "viability determination requirement" in an abortion statute was ambiguous because the standard for determining the viability of a fetus was unclear. The court did not declare the phrase "sufficient reason to believe" unconstitutionally vague as Plaintiff's memorandum implies.

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III. CONCLUSION

Thus, a constitutional challenge based on vagueness questions "whether ordinary people will understand what the statute requires or forbids-when measured by common understanding and practice." *State v. Bussey,* 463 So.2d 1141, 1144 (Fla. 1986). The terms "reasonable" and "believes" are words of common usage found in any standard dictionary. Any person of ordinary intelligence understands their meaning. Further, the average juror has the ability to determine the question of "reasonable belief", since the reasonableness standard has been sufficiently utilized in several other Florida criminal statutes and upheld by the United States Supreme Court. Therefore, a statute that affords an affirmative defense to a person criminally charged based on his "reasonable belief" should not be held unconstitutionally vague. This Court therefore denies Plaintiff's Motion for Summary Judgment and grants Defendants' Cross Motion for Summary Judgment upholding the statute as constitutionally valid.

DONE AND ORDERED at West Palm Beach, Florida, this 26th day of July, 1993.

s/ Richard B. Burk
RICHARD B. BURK, CIRCUIT JUDGE

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